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986905—52——1

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 468

MICHAEL (MICKEY) COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion (Items 2, 4).[1] The opinion of Chief Judge Denman dated August 23, 1951 (Item 7), is reported at 191 F. 2d 300. His opinion, dated November 27, 1951, is not reported (Item 12). The *per curiam* order of the Court of Appeals, dated December 13, 1951 (Item 23), is not reported.

JURISDICTION

The order of the Court of Appeals was entered on December 13, 1951. (Item 23.) The original petition for a writ of certiorari was filed on

[1] Items referred to are contained in the transcript of record lodged with the Clerk, which has not been printed.

December 6, 1951. An amended petition was filed on December 20, 1951, and a "revised amended" petition was filed on January 11, 1952. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Although the petition for certiorari, in its latest "revised amended" form, discusses other matters, principally the merits of petitioner's conviction which is now pending on appeal in the court below, the Government considers, for reasons that will appear, that the only question requiring discussion is whether the Court of Appeals had power to vacate the order fixing bail which had previously been entered by Chief Judge Denman.

RULES INVOLVED

Rule 39 (a) of the Federal Rules of Criminal Procedure:

> (a) *Supervision in Appellate Court.*— The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

Rule 46 (a) provides:

> (a) *Right to Bail.*
>
> (1) Before Conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.
>
> (2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail.

STATEMENT

Petitioner was convicted on July 9, 1951, on charges of wilfully and knowingly attempting to defeat and evade income taxes for the years 1946, 1947, and 1948, in violation of Section 145 (b), Internal Revenue Code (counts one, three, and five), and of making false and fraudulent statements to the Treasury Department of the United States, in violation of 18 U. S. C., Supp. IV, 1001 (count six) (Items 1, 2). He was sentenced to five years' imprisonment and $10,000 fine on each count, the

periods of imprisonment to run concurrently, and payment of $10,000 to satisfy the fines in full (Item 2).

A notice of appeal was filed on July 10, 1951 (Item 3). A petition for bail pending appeal was filed by petitioner on July 11, 1951, and denied by the trial court on the ground that no substantial question was involved (Item 4).

A second petition for bail (Item 6), filed in the Court of Appeals for the Ninth Circuit, was denied by Chief Judge Denman on August 23, 1951. *Ex parte Cohen,* 191 F. 2d 300. (Item 7.)

A petition for reconsideration of this denial of the application for bail was filed by petitioner on November 27, 1951 (Item 8). On that date, Chief Judge Denman set aside his prior order denying bail and admitted petitioner to bail in the sum of $5,000 (Item 12). The United States Attorney thereupon petitioned the Court of Appeals for reconsideration of Chief Judge Denman's order of November 27, 1951 (Item 15); arguments were heard on December 11, 1951, before the court, sitting *en banc,* consisting of Judges Mathews, Stephens, Healy, Bone, Orr, and Pope (Item 19). Chief Judge Denman did not participate. In a *per curiam* order dated December 13, 1951, the order of Chief Judge Denman granting bail was vacated, Judges Pope, Orr, and Stephens stating separate grounds for their concurrence in the court's order (Item 23).

Petitioner then filed a petition for a writ of certiorari, which has been twice amended, seeking review of the order of December 13, 1951. He also filed with Mr. Justice Douglas a petition for bail, which was denied on December 29, 1951, and later a petition for reconsideration of the order denying bail, which was denied on January 22, 1952.

ARGUMENT

Petitioner's argument, while presented in various forms, divides itself into two main parts: (1) that the Court of Appeals had no jurisdiction or authority to review and set aside the order of Chief Judge Denman admitting petitioner to bail; and (2) that in any event the order of Chief Judge Denman was correct because the case involves several substantial questions on appeal. The bulk of his argument (Pet. 12–15; Br. 16–56) is directed to the many points he intends to argue on the appeal itself.

1. In reviewing and vacating the order of Chief Judge Denman, the Court of Appeals acted under the authority of Rule 39 (a) of the Federal Rules of Criminal Procedure, *supra*, p. 2. The pertinent portion of the Rule follows:

> The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or *vacate any order made by*

> *the district court or by any judge* in relation to the prosecution of the appeal, *including any order fixing or denying bail.* [Emphasis supplied.] [2]

In clear and unambiguous language, the Rule empowers the courts of appeals to modify or vacate any order respecting bail made by *any* judge, including any judge of the appellate court. Petitioner would construe "any judge" to mean only "any judge of the district court." If he were right, the words "or by any judge" would be redundant because the Rule explicitly grants authority to modify or vacate orders made "by the district court", normally, of course, consisting of a single judge. But there is an even more persuasive answer to petitioner's argument. Rule 39 (a) must be read in conjunction with Rule 46 (a) (2), which provides that "Bail may

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[2] The reviser's note to Rule 39 (a) states that "This rule substantially continues the existing practice. See second paragraph of Rule IV of the Criminal Appeals Rules of 1933, 292 U. S. 661." The second and third paragraphs of Rule IV of the Criminal Appeals Rules (292 U. S. 663) provided:

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

"The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to *vacate* or modify *any order made by the trial court or by any judge in relation* to the prosecution of the appeal, *including any order for the granting of bail.*" [Emphasis supplied.]

be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice." Thus, under Rule 46 (a) (2), only the district judge who presided at the trial can allow bail, while every judge of the court of appeals has that power.[3] Consequently, the grant of power in Rule 39 (a) to a court of appeals to vacate any order respecting bail made "by the district court or by any judge" obviously refers to any bail order made by the trial judge or by any judge of the court of appeals. So far as bail orders are concerned, it could not possibly mean "other district judges" because the latter could not, under Rule 46 (a) (2), grant or deny bail.

2. Petitioner also contends that he should have been allowed bail pending review of his conviction, and that it was reversible error for the Court of Appeals to deny such bail. His argument seems to treat the matter as if this were a case of an application for bail *before* trial, where, of course, bail is a matter of right, except in capital cases. Rule 46 (a) (1). As the Court pointed out in *Stack* v. *Boyle,* 342 U. S. 1, 4, "From the passage of the Judiciary Act of 1789,

[3] The reviser's note to Rule 46 (a) (2) states that it is "substantially a restatement of Rule 6 of Criminal Appeals Rules, with the addition of a reference to bail pending certiorari." Rule VI of the Criminal Appeals Rules provided: "The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the appellate court, or, where the appellate court is not in session, by any judge thereof or by the circuit justice." 292 U. S. 663–664.

1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46 (a) (1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. * * * Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

Bail after conviction is very different. The presumption of innocence has disappeared, and is supplanted by the verdict of guilt rendered by the jury. Rule 46 (a) (2) provides that after conviction "Bail *may* be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determines by the appellate court." [Emphasis supplied.] Bail after conviction is thus not a matter of right; it is, rather, a matter for the exercise of sound judicial discretion. *Williamson* v. *United States,* 184 F. 2d 280, 281 (C. A. 2, opinion of Circuit Justice Jackson); *Baker* v. *United States,* 139 F. 2d 721 (C. A. 8); *McKnight* v. *United States,* 113 Fed. 451 (C. A. 6); *Ex parte Harlan,* 180 Fed. 119 (C. C. N. D. Fla.); *United States* v. *Burgman,* 89 F. Supp. 228 (D. D. C.)

Since the sentences imposed on petitioner on each of the four counts on which he was convicted were concurrent, the judgment could not be reversed unless the conviction was invalid on all four counts. *Pinkerton* v. *United States,* 328 U. S. 640, 642; *Hirabayashi* v. *United States,*

320 U. S. 81, 85. Similarly, bail pending appeal could not be allowed unless the appellate court found that a substantial question was involved as to each count. *Danziger* v. *United States,* 161 F. 2d 299 (C. A. 9); *Lowden* v. *United States,* 187 F. 2d 484 (C. A. 9). In this case neither the trial judge, nor six of the seven judges of the Court of Appeals, nor Mr. Justice Douglas, to whom the matter was twice presented, could find that petitioner had made the showing required for bail under Rule 46 (a) (2). In the memoranda filed in opposition to bail, the Government demonstrated at some length the lack of substantiality in the many points petitioner is raising in his appeal to the court below.[4] It would serve no useful purpose to retravel that ground here. In the present posture of the case, the decision of the merits of petitioner's appeal is confided solely to the court below. Though the petition in this case does not constitute an attempt to get this Court fully to displace the court below, it is an effort to have this Court make an inquiry into the very questions raised by the appeal to the court of appeals. Certainly the questions raised by petitioner which go to the propriety of his conviction are not of such singular importance as to warrant the issuance of a writ of certiorari to review the legality of his conviction

[4] For the Court's convenience, extracts from the Government's memorandum in opposition to the petition for reconsideration of Mr. Justice Douglas' order denying bail are set forth in the Appendix.

which has not yet been finally passed upon by the court below. Particularly in this aspect, the petition for certiorari is, in essence, nothing more than a request for review by the full Court of Mr. Justice Douglas' orders denying bail. It is only in the rare case, if ever, that the Court should be so taxed.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ELLIS N. SLACK,
Acting Assistant Attorney General.

MEYER ROTHWACKS,
JOHN LOCKLEY,
Special Assistants to the Attorney General.

FEBRUARY 1952.

APPENDIX

Extracts from the Government's memorandum in opposition to the petition for reconsideration of Mr. Justice Douglas' order denying bail:

> The petition for reconsideration attempts at length to prove there is substance in the many points on which petitioner is relying in his appeal. However, the petition falls far short of making the showing required by Rule 46 (a) (2).
>
> 1. The main point which petitioner tries to make is that 18 U. S. C., Supp. IV, 1001, on which count 6 of the indictment was based, is inapplicable to this case; and, if held applicable, is unconstitutional. He argues that 26 U. S. C., the Internal Revenue Code, is complete and exclusive, and that any false statements made to revenue agents, such as were charged and proved against petitioner in this case, are punishable only under the Internal Revenue Code, particularly 26 U. S. C. 3616, and not under 18 U. S. C. 1001, the general "false statements" statute. The short answer is, as petitioner himself recognizes elsewhere in his petition (p. 6), that there is no overlapping of statutes here because 26 U. S. C. 3616 applies only to false statements given to a collector or deputy collector and not, as here, to special agents. Moreover, even if there were such an overlap, it is no defense to a prosecution under 18 U. S. C. 1001 that the allegations and proof could also sustain conviction under some other specific statutory provision making it a

crime to defraud or deceive particular Government agencies or officials. *United States* v. *Tommasello,* 160 F. 2d 348 (C. A. 2); *United States* v. *Heine,* 149 F. 2d 485 (C. A. 2). The general criminal statutes have been resorted to from time to time in internal revenue prosecutions in place of, or in addition to, the various penalty provisions of the Internal Revenue Code. *Gaunt* v. *United States,* 184 F. 2d 284 (C. A. 1); *Ex parte Berkoff,* 65 F. Supp. 976 (D. Minn.); *Capone* v. *United States,* 51 F. 2d 609 (C. A. 7), certiorari denied, 284 U. S. 669.

The suggestion that 18 U. S. C. 1001 is too vague and indefinite to be constitutional is completely refuted by *United States* v. *Gilliland,* 312 U. S. 86, sustaining the validity of Section 35 of the old Criminal Code, from which 18 U. S. C. 1001 is taken.

In any event, as already noted, the contentions petitioner makes, in many forms, as to the inapplicability or invalidity of 18 U. S. C. 1001 go only to the propriety of his conviction under count six; reversal of his conviction on that count alone would in no way affect the concurrent sentences imposed on the other counts.

2. Petitioner's second main argument is that Exhibit 20, the false "net worth statement", was erroneously admitted into evidence, and that this error permeated all four counts on which he was convicted. He contends that this statement was merely one of monies received and loans made, and that it is not sufficient to form the foundation of a "net worth" case of income-tax evasion. This argument overlooks the obvious fact that Exhibit 20 was the basis for count 6, the false statements count, and it was offered primarily to

support the proof under that count and not as the keystone of the proof under the other counts charging tax evasion. As to count six, it was enough to show that Exhibit 20 was false (*Mitchell* v. *United States,* 143 F. 2d 953 (C. A. 10)), and not that it met the standards of specificity, etc., required of a net-worth statement upon the basis of which the Government is seeking to prove tax evasion. Hence, if count six is valid, Exhibit 20 was properly admitted. In any event, as the petition itself discloses (p. 16), the tax-evasion counts were sought to be proved by the Government by the "expenditures method" (as in *United States* v. *Johnson,* 319 U. S. 503, and *Schuermann* v. *United States,* 174 F. 2d 397 (C. A. 8), certiorari denied, 338 U. S. 831), and not by the "net worth method". Since a "net worth" statement is essential only in a prosecution based on the latter theory, its alleged inadequacies here could not affect the validity of petitioner's conviction.

3. Petitioner contends that Exhibit 20 was obtained from him by entrapment because he was requested by the revenue agents to prepare a "net worth statement." This is like arguing that a witness who commits perjury is entrapped by the lawyer who asked the question.

4. Petitioner complains that his income tax returns for prior years were improperly admitted in evidence against him. But evidence of that kind is admissible in cases based on the "expenditures theory" to negative the possibility that such expenditures were made out of prior accumulations and to shed further light on the significance of the proof bearing on the defendant's expenditures. See *Schuer-*

mann v. *United States,* 174 F. 2d 397, 399 (C. A. 8).

5. Petitioner contends that the conduct and demeanor of the trial judge were prejudicial. The colloquy on which he relies, set forth in petition at page 46, merely illustrates the difficulties of a temperate judge in seeking to restrain a truculent and reluctant witness.

6. Petitioner's last point is that he acquired immunity from prosecution because of his testimony before the Kefauver Committee in Los Angeles on November 17, 1950. He relies in this connection on 18 U. S. C., Supp. IV, 3486, which provides that "No testimony given by a witness before either House, or before any committee of either House, * * * shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony."

But this provision does not help petitioner because, as he admits (petition, p. 49), none of his testimony before the Kefauver Committee was used in evidence in this case. The statute in terms does not afford immunity from prosecution for matters testified before a congressional committee; it merely limits the evidentiary use which may be made of such testimony. *May* v. *United States,* 175 F. 2d 994 (C. A. D. C.); *United States* v. *DeLorenzo,* 151 F. 2d 122 (C. A. 2).

U. S. GOVERNMENT PRINTING OFFICE: 1952

No. 468

JAN 18 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

MICHAEL (MICKEY) COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR RECONSIDERATION OF ORDER
DENYING BAIL

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 468

MICHAEL (MICKEY)COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR RECONSIDERATION OF ORDER DENYING BAIL

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

Petitioner was convicted on July 9, 1951, on charges of wilfully and knowingly attempting to defeat and evade income taxes for the years 1946, 1947 and 1948, in violation of Section 145(b), Internal Revenue Code (counts one, three, and five of the indictment), and of making false and fraudulent statements to the Treasury Department of the United States, in violation of 18 U.S.C., Section 1001 (count six). He was sentenced to five years' imprisonment and $10,000 fine on each count, the periods of imprisonment to run concurrently and payment of $10,000 to satisfy the fines in full.

A notice of appeal was filed on July 10, 1951. A petition for bail pending appeal was filed by petitioner on July 11, 1951, and denied by the trial court, Judge Harrison of the Southern District of California, on the ground that no substantial question was involved.

A second petition for bail, filed in the Court of Appeals for the Ninth Circuit, was denied by Chief Judge Denman on August 23, 1951. Ex parte Cohen, 191 F. 2d 300.

A petition for reconsideration of this denial of bail was filed on November 27, 1951. On that date, Chief Judge Denman set aside his prior order and admitted Cohen to bail in the sum of $5,000. The United States Attorney thereupon petitioned the Court of Appeals for reconsideration of Chief Judge Denman's order of November 27, 1951; arguments were heard on December 11, 1951, before the court, sitting en banc, consisting of Judges Mathews, Stephens, Healy, Bone, Orr, and Pope (Chief Judge Denman did not participate); and in a per curiam order dated December 13, 1951, the order of Chief Judge Denman granting bail was vacated, Judges Pope, Orr, and Stephens concurring separately.

Petitioner then filed a petition for a writ of certiorari, which has twice been amended and in its latest form is captioned as a "revised amended petition", in which he contends that the action of the Court of Appeals in vacating the order of Chief Judge Denman fixing bail was erroneous and beyond the court's power. He also filed with Mr. Justice Douglas a petition for bail, which was denied on December 29, 1951. Mr. Justice Douglas's denial was expressly based on petitioner's failure to make the showing required under Rule 46(a)(2) of the Federal Rules of Criminal Procedure, which provides:

> . . . Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail.

ARGUMENT

In its previous memorandum in opposition to bail, filed December 29, 1951, the Government pointed out (1) that under Rule 46(a)(2) petitioner is not entitled to bail pending appeal unless he can show that "the case involves a substantial question which should be determined by the appellate court"; (2) that in this case since the sentences imposed

on petitioner on each of the four counts were concurrent, the judgment could not be set aside unless the conviction was invalid on all four counts, and similarly bail on appeal could not be allowed unless a substantial question was involved as to each count; (3) that although the petition for bail recited that there were 33 assignments of error upon which petitioner intended to rely, he had failed to set forth any facts or argument to show that any of the assigned errors raised a substantial question; (4) that the denial of bail by the per curiam order of the Court of Appeals shows that six of the seven judges of that court do not think there is merit in petitioner's appeal and thus makes it almost a certainty that his conviction will in due course be affirmed; (5) that, in the event of such affirmance, petitioner's only recourse would be to seek review by certiorari, and he has not indicated how this case raises questions warranting review by the Supreme Court; and, finally, (6) that the petition for bail failed to sustain the heavy burden resting on petitioner in asking the Circuit Justice to override the judgment of the trial judge and all except one of the circuit judges that no substantial questions were raised by the appeal.

The petition for reconsideration attempts at length to prove there is substance in the many points upon which petitioner is relying in his appeal. However, the petition falls far short of making the showing required by Rule 46(a)(2).

1. The main point which petitioner tries to make is that 18 U.S.C. 1001, on which count 6 of the indictment was based, is inapplicable to this case; and, if held applicable, is unconstitutional. He argues that 26 U.S.C., the Internal Revenue Code, is complete and exclusive, and that any false statements made to revenue agents, such as were charged and proved against petitioner in this case, are punishable only under the Internal Revenue Code, particularly 26 U.S.C. 3616, and not under 18 U.S.C. 1001, the general "false statements" statute.

The short answer is, as petitioner himself recognizes elsewhere in his petition (p. 6), that there is no overlapping of statutes here because 26 U.S.C. 3616 applies only to false statements given to a collector or deputy collector and not, as here, to special agents. Moreover, even if there were such an overlap, it is no defense to a prosecution under 18 U.S.C. 1001 that the allegations and proof could also sustain conviction under some other specific statutory provision making it a crime to defraud or deceive particular Government agencies or officials. United States v. Tomasello, 160 F. 2d 348 (C.A. 2); United States v. Heine, 149 F. 2d 485 (C.A. 2). The general criminal statutes have been resorted to from time to time in internal revenue prosecutions in place of, or in addition to, the various penalty provisions of the Internal Revenue Code. Gaunt v. United States, 184 F. 2d 284 (C.A. 1); Ex parte Berkoff, 65 F. Supp. 976 (D. Minn.); Capone v. United States, 51 F. 2d 609 (C.A. 7), certiorari denied, 284 U.S. 669.

The suggestion that 18 U.S.C. 1001 is too vague and indefinite to be constitutional is completely refuted by United States v. Gilliland, 312 U. S. 86, sustaining the validity of Section 35 of the old Criminal Code, from which 18 U.S.C. 1001 is taken.

In any event, as already noted, the contentions petitioner makes, in many forms, as to the inapplicability or invalidity of 18 U.S.C. 1001 go only to the propriety of his conviction under count six; reversal of his conviction on that count alone would in no way affect the concurrent sentences imposed on the other counts.

2. Petitioner's second main argument is that Exhibit 20, the false "net worth statement", was erroneously admitted into evidence, and that this error permeated all four counts on which he was convicted. He contends that this statement was merely one of monies received and loans made, and that it is not sufficient to form the foundation of a "net worth" case for income-tax evasion. This argument overlooks the obvious fact that Exhibit 20 was the basis for count 6, the false statements count, and it was offered primarily to support the proof

under that count and not as the keystone of the proof under the other counts charging tax evasion. As to count six, it was enough to show that Exhibit 20 was false (Mitchell v. United States, 143 F. 2d 952 (C.A.10), and not that it met the standards of specificity, etc., required of a net-worth statement upon the basis of which the Government is seeking to prove tax evasion. Hence, if count six is valid, Exhibit 20 was properly admitted. In any event, as the petition itself discloses (p.16), the tax-evasion counts were sought to be proved by the Government by the "expenditures method" (as in United States v. Johnson, 319 U.S. 503, and Schuermann v. United States, 174 F. 2d 397 (C.A. 8), certiorari denied, 330 U.S. 831), and not by the "net worth method". Since a "net worth" statement is essential only in a prosecution based on the latter theory, its alleged inadequacies here could not affect the validity of petitioner's conviction.

3. Petitioner contends that Exhibit 20 was obtained from him by entrapment because he was requested by the revenue agents to prepare a "net worth statement." This is like arguing that a witness who commits perjury is entrapped by the lawyer who asked the question.

4. Petitioner complains that his income tax returns for prior years were improperly admitted in evidence against him. But evidence of that kind is admissible in cases based on the "expenditures theory" to negative the possibility that such expenditures were made out of prior accumulations and to shed further light on the significance of the proof bearing on the defendant's expenditures. See Schuermann v. United States, 174 F. 2d 397, 399 (C.A. 8).

5. Petitioner contends that the conduct and demeanor of the trial judge were prejudicial. The colloquy on which he relies, set forth in petition at page 46, merely illustrates the difficulties of a temperate judge in seeking to restrain a truculent and reluctant witness.

6. Petitioner's last point is that he acquired immunity from prosecution because of his testimony before the Kefauver Committee in Los Angeles on November 17, 1950. He relies in this connection on

18 U.S.C. 3486, which provides that "No testimony given by a witness before either House or before any committee of either House, * * * shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony."

But this provision does not help petitioner because, as he admits (petition, p. 49), none of his testimony before the Kefauver Committee was used in evidence in this case. The statute in terms does not afford immunity from prosecution for matters testified before a congressional committee; it merely limits the evidentiary use which may be made of such testimony. May v. United States, 175 F. 2d 994 (C.A. D.C.); United States v. DeLorenzo, 151 F. 2d 122 (C.A. 2).

CONCLUSION

Petitioner has again failed to show, as required by Rule 46(a)(2), that his appeal presents, as to each of the four counts on which he was convicted, "a substantial question which should be determined by the appellate court." Bail should be denied. 1/

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1952

1/ If it should be concluded that bail should be allowed, the Government would desire to be heard on the question of the amount to be fixed.

FILED
FEB 23 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 466

[redacted]

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO FILE BRIEF.

[redacted]

Attorneys for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 468

MICHAEL (MICKEY) COHEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION TO FIX BAIL

COMES NOW Michael Cohen and moves this Honorable Court to fix bail in the matter of Michael Cohen. This application is based upon the fact that Michael Cohen's bail has been fixed by Chief Justice William Denman of the United States Court of Appeals for the Ninth Circuit and that bail has never been revoked, and is based upon all the records and files and petitions filed with this Court.

It is further based upon the fact that application was made to Justice Douglas for fixing bail pending the determination of the application for writ of certiorari by Michael Cohen and that said application to Justice Douglas was opposed by the Solicitor General on the ground that, among other grounds, it would render moot the application for certiorari pending before this Court and would in effect decide the issue pending before the entire court by the decision of a single judge. Therefore, we ask that the entire court pass upon the application for bail.

The Motion is based upon all of the records, files and papers in the case in this Court and on the application made to the Court and to Justice Douglas.

Morris Lavine

Morris Lavine
Attorney for Petitioner

MAY 13 1952
CHARLES ELMORE CROPLEY
CLERK

[redacted]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 468

MICHAEL (MICKEY) COHEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING AND FOR AN ORDER GRANTING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

COMES NOW Michael Cohen, petitioner, and again petitions for rehearing on the following ground:

On April 21st, 1952, this Court granted certiorari in the case of United States v. Beacon Brass Co., Inc.,(20 L.W. 3272, No. 662) and Maurice Feinberg involving a dismissal of an indictment charging violation of Section 145(b), Title 26, the Internal Revenue Code, on the ground that "false statements" more properly were made under Section 1001, Title 18, U. S. Code.

Our case involves a conviction of both Title 26, Sec. 145(b) and Title 18, Section 1001, and the alleged false statement was used as a basis for establishing the conviction of Title 26 Section 145(b).

It is our contention that neither Section 145(b) nor Section 1001 apply to false statements in Internal Revenue matters, but that they are governed by a brand new Section, passed by Congress in 1949, to-wit Section 3809 Title 26 (Internal Rev. Code) reading as follows:

"§ 3809. Verification of returns; penalties of perjury

(a) Penalties. Any person who wilifully makes and subscribes any return, statement, or other document which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(b) Signature presumed correct. The fact that an individual's name is signed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

(c) Verification in lieu of oath. The Commissioner, under regulations prescribed by him with the approval of the Secretary may require that any return, statement, or other document required to be filed under any provision of the internal revenue laws shall contain or be verified by a written declaration that it is made under the penalties of perjury, and such declaration shall be in lieu of any oath otherwise required. Added August 27, 1949, c. 517, § 4(a), 63 Stat. 667."

Thus Section 3809, passed August 27, 1949 by the Eighty-first Congress was intended to be exclusive, as to any statement within the

jurisdiction of the Internal Revenue Bureau - and was meant to apply under conditions and terms there expressed. Therefore, although we contend that Section 1001, Title 18, has no application, it is for a different reason and because of a different statute not cited by the government in its jurisdictional statement.

Because of the importance and similarity of issues involved in the interpretation of Title 26, Section 145(b); Title 18, Section 1001, and Title 26, Section 3809 and as the government now contends in the Beacon Brass Co. case, Oct. Term 1951, No. 662, "is a substantial one", we petition for re-hearing of our Petition for Certiorari in our case and thus an opportunity to present our views of this "substantial question" at the same time as in the Beacon Brass Co. case.

As stated by the government in its jurisdictional statement, "The issue presented in this appeal is one of obvious importance in the administration of the federal income tax laws" etc. (Jurisdiction statement, page 5, Beacon Brass Co., case No. 662).

We pray for rehearing and for leave to proceed on the typewritten record and mimeographed petitions and briefs.

Respectfully submitted,

MORRIS LAVINE

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is filed in good faith and not for the purpose of delay, and that the question is one being presented as a result of the decision of this court granting certiorari